Supreme Court, U.S.
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No. 88-1822

IN THE

Supreme Court of the United States

October Term, 1988

DIANE W. OATES (NOW EICHENBERGER), *et al.*,
Petitioners,

v.

BEVERLY W. OATES, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT BEVERLY W. OATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I.

QUESTION PRESENTED

1. Whether attorney fees can be included as part of a Civil Rule 68 Settlement in the context of a federal wiretap action pursuant to 18 U.S.C. Section 2520.

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The Petitioners in this action, Diane W. Oates (now Eichenberger) and Deborah Wogan, request the issuance of a writ of certiorari pursuant to a decision of the United States Court of Appeals for the Sixth Circuit

denying an application for attorney's fees. A considered judgment in determining whether to accept a Petition for Writ of Certiorari can only be made upon review of all pertinent facts. The pertinent facts were completely omitted from the Petition submitted by the Petitioners. The facts set forth in this Brief in Opposition to the Petition clearly demonstrate that the Petitioners knew or should have known that attorney fees were included as part of the Civil Rule 68 settlement. Therefore, this case is an inappropriate case for acceptance by the United States Supreme Court since it turns not on a question of law but upon facts which were established at the Trial Court level.

Petitioners failed to mention in their Brief that the Civil Rule 68 Offer of Judgment was couched in the following terms:

> This letter shall serve as a formal Offer of Judgment pursuant to Federal Civil Rule 68 on behalf of Defendant Beverly W. Oates.
>
> The Offer of Judgment is in the total amount of $4,000.00. This amount covers *all amounts* which Plaintiffs may be entitled to in this action. This is not $4,000.00 to each Plaintiff, rather a total of $4,000.00. In addition, Defendant Oates shall pay all court costs accrued through November 27, 1987 (of course, it is the intent of Defendant Oates to ultimately hold Defendant Fishman responsible for the costs) (See Appendix A).

Petitioners also fail in their Petition for Writ of Certiorari to set forth the conversation which took place in chambers for the purpose of recording on the record the terms of the Civil Rule 68 settlement. In the presence of District Court Judge James Graham, the following exchange took place:

> The Court: Lets take care of that part of it first. It is my understanding, Mr. Eichenberger, that your clients have reached a settlement with

Defendant Oates and that all claims against Defendant Oates by Plaintiffs Diane Oates Eichenberger and Deborah Wogan are settled for the total sum of $4,000.00?

Mr. Eichenberger: Technically Judge, there was a Civil Rule 68, Offer of Judgment, which has been accepted by us and it will be entered onto the record as a judgment.

The Court: Is that understood?

Mr. Leithart, II: Yes.

Mr. Strip: Yes, your Honor (See Appendix B).

Petitioners also failed to disclose in their Petition for Writ of Certiorari that prior to the conversation with Judge Graham, discussions were held between the attorneys for Beverly Oates and the Petitioners. The conversation made it clear that the Offer of Judgment disposed of all issues of the case and there would be nothing remaining. At no time throughout the conference was the subject of attorney's fees raised (see Appendix C).

The Civil Rule Offer of Judgment in this case clearly stated that the Plaintiffs were entitled to nothing more than $4,000.00. The sole exception to that was court costs. As District Judge Graham so aptly stated in his decision on the attorney fee issue, "18 U.S.C. Section 2520 specifically defines what a Plaintiff may recover for a violation of the statute. These include (a) actual damages (b) punitive damages and (c) reasonable attorney's fees and other litigation costs. Accordingly, Defendant's offer of judgment for 'all amounts which Plaintiffs may be entitled to in this action' necessarily included Plaintiffs' claim for actual damages, punitive damages, reasonable attorney's fees and litigation costs. Defendant's offer also included an offer to pay 'all court

costs accrued'. In common legal parlance court costs would not include attorney's fees but would be limited to those costs which may be taxed by the clerk pursuant to 28 U.S.C. Section 1920 such as the fees of the clerk and the marshal, docket fees, witness fees, and court reporter's fees."

It is therefore indisputable that the Offer of Judgment included anything Plaintiffs were entitled to in the action, including attorney's fees. In *Marek vs. Chesny,* 473 U.S. 1 (1985), this court approved the procedure of including attorney's fees in an Offer of Judgment under Federal Rule 68. In this action, that is exactly what occurred. The Offer of Judgment by its very terms, the conversation with Judge Graham on the record, and the conversation with counsel for Beverly Oates clearly demonstrated to Petitioners and their counsel that they were entitled to no more than the total sum of $4,000.00.

District Court Judge James Graham and the unanimous Court of Appeals panel has denied the Petitioners' request for legal fees in the amount of $12,000.00. Thus, each and every Judge who has reviewed the facts and law applicable to this action has held that the terms of the Offer and Acceptance of Judgment clearly provided that Plaintiffs were entitled to no more than the sum of $4,000.00. Acceptance of the arguments advanced by Petitioners would require this court to hold that under no circumstances may parties agree under Federal Rule 68 in context of a wiretap action to fully and finally settle the case because the issue of legal fees, which is always a substantial issue, can only be resolved through a cost proceeding. Such an argument is not only contrary to law but is contrary to good sense in that it will inhibit rather than advance the policy underlying Civil Rule 68. The policy underlying Civil Rule 68 is to encourage the resolution of claims short of a protracted expensive trial.

The legal arguments advanced by Petitioners are advanced outside the context of the facts of this case. Once the facts of this case are closely reviewed, it becomes obvious that Petitioners and their counsel were fully aware that they were accepting the sum of $4,000.00 as full and final total settlement of any amounts to which they may be entitled. It is respectfully submitted that this court has much greater issues of constitutional and national concern to which it should be devoting its time.

The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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APPENDIX A

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MICHAEL P. VASKO
MYRON M. TERLECKY

November 27, 1987

[Case No. C-2-85-101]

Raymond Eichenberger, Esq.
1418 Brice Road
Reynoldsburg, Ohio 43068

Re: Oates vs. Oates
Wiretap Action

HAND-DELIVERED:

Dear Ray:

This letter shall serve as a formal Offer of Judgment pursuant to Federal Civil Rule 68 on behalf of defendant Beverly W. Oates.

The Offer of Judgment is in the total amount of $4,000.00. This amount covers all amounts which plaintiffs may be entitled to in this action. This is not $4,000.00 to each plaintiff, rather a total of $4,000.00. In addition, defendant Oates shall pay all court costs

accrued through November 27, 1987 (of course, it is the intent of defendant Oates to ultimately hold defendant Fishman responsible for the costs).

Thank you for your attention to this matter.

Very truly yours,

/s/ PAUL W. LEITHART, II
Paul W. Leithart, II

PWL/cr1

cc: Andrew Fishman
Beverly W. Oates

APPENDIX B

Case No. C-2-85-101

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DIANE W. OATES, *et al.*,
Plaintiffs,

vs.

BEVERLY W. OATES, *et al.*,
Defendants.

AFFIDAVIT

STATE OF OHIO }
FRANKLIN COUNTY } ss:

A.C. Strip, being first duly cautioned and sworn, states as follows:

1. He is an Attorney at Law, licensed to practice in the State of Ohio and before the United States Federal District Court, Southern District of Ohio, Eastern Division, and has been counsel for defendant Beverly W. Oates in this action.

2. The Offer of Judgment dated November 27, 1987 in the total sum of $4,000.00 was specifically made to include all amounts to which plaintiffs may be entitled in this action for the reason that this would cover any and all amounts to which plaintiffs may be entitled, including but not limited to compensatory damages, punitive damages, attorney fees, and other costs of litigation. The sole exception was court costs. Court costs are

commonly known to refer to and refer to in this instance to those costs which are listed on the Clerk of Courts cost sheet.

3. Prior to entering the Court's conference room to read the terms of settlement into the record, the settlement was carefully enunciated by the undersigned to Mr. Eichenberger. The conversation made it clear that the offer of judgment and acceptance thereof disposed of *all* issues in this case and there would be nothing remaining. This conversation took place in the presence of Mr. Fishman and it was on this basis and only after an acknowledgment by Mr. Eichenberger that the settlement with Mr. Fishman was entered into.

At no time throughout this conference with Mr. Eichenberger (who conferred with his client/wife) was the subject matter of Attorney fees raised. If in fact, this was a thought in Mr. Eichenberger's mind, his silence on the subject has to be regarded by the undersigned as an intentional silence to subvert the settlement process. The purpose of the settlement negotiation was to resolve all issues—not just some of them. There was no conversation of any additional sums that would be sought from Defendant Oates for any purpose or based on any theory.

/s/ A. C. STRIP
A. C. Strip

Sworn to before me and subscribed in my presence this 27th day of January, 1988.

/s/ PAUL LEITHART
Notary Public

PAUL W. LEITHART II, Attorney at Law
Notary Public, State of Ohio
My Commission has no expiration date
Section 147.03 R.C.

APPENDIX C

TUESDAY MORNING SESSION
DECEMBER 8, 1987

[2] THE COURT: Gentlemen, I would like to make a record of what we have done here this morning.

MR. STRIP: Your Honor, Mr. Leithart is bringing the client. We thought he should be present on the record for our protection. This is Mr. Oates.

THE COURT: Let's take care of that part of it first. It is my understanding, Mr. Eichenberger, that your clients have reached a settlement with defendant Oates and that all claims against defendant Oates by plaintiffs Diane Oates Eichenberger and Deborah Wogan are settled for the total sum of four thousand dollars?

MR. EICHENBERGER: Technically, judge, there was a Civil Rule 68, offer of judgment, which has been accepted by us and it will be entered on to the record as a judgment.

THE COURT: Is that understood?

MR. LEITHART: Yes.

MR. STRIP: Yes, your Honor.

THE COURT: It is my further understanding that the plaintiffs have agreed to dismiss their claims against defendant Fishman?

MR. EICHENBERGER: That is correct, your Honor.

THE COURT: With prejudice?